

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

- - - - -X

SINOPE SHIPPING CO. LTD., :

Plaintiff, :

ORDER

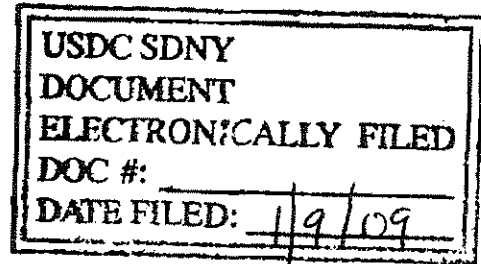
- against - :

08 Civ. 8999 (DC)

INDUSTRIAL CARRIERS INC. a/k/a ICI, :  
WEAVER INVESTMENTS INC., SELENE :  
SHIPMANAGEMENT SA, AUSTER MARINE :  
CO. and DIAMANT CO. LTD., :

Defendants. :

- - - - -X

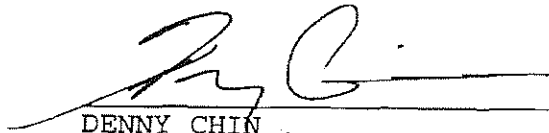


CHIN, District Judge

Plaintiff's motion for reconsideration is denied. The alternative request for a stay of the order vacating the attachment order is denied, except that the order vacating the attachment order is stayed for ten days

SO ORDERED.

Dated: New York, New York  
January 9, 2009

  
DENNY CHIN  
United States District Judge

USDC SDNY
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DATE FILED: 12/9/08

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SOUTHERN DISTRICT OF NEW YORK

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Plaintiff, :

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INDUSTRIAL CARRIERS INC. a/k/a ICI, :  
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SHIPMANAGEMENT SA, AUSTER MARINE :  
CO. and DIAMANT CO. LTD., :

Defendants. :

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ORDER

08 Civ. 8999 (DC)

CHIN, District Judge

For the reasons stated on the record today, the claims against defendant Diamant Co. Ltd. are dismissed and the order of attachment entered in this case is vacated as to Diamant Co. Ltd.

SO ORDERED.

Dated: New York, New York  
December 9, 2008

  
DENNY CHIN  
United States District Judge

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1 UNITED STATES DISTRICT COURT  
1 SOUTHERN DISTRICT OF NEW YORK

2 -----X

3 SINOPE SHIPPING COMPANY, LTD.,

4 Plaintiff,

5 v.

08 CV 8999 (DC)

6 INDUSTRIAL CARRIERS, INC.  
6 a/k/a ICI, WEAVER INVESTMENTS,  
7 INC., SELENE SHIPMANAGEMENT  
7 SA, AUSTER MARINE CO., DIAMANT  
8 CO. LTD,

9 Defendants.

10 -----X

11 New York, N.Y.  
11 December 9, 2008  
12 10:30 a.m.

13 Before:

14 HON. DENNY CHIN,

15 District Judge

16 APPEARANCES

17 LENNON, MURPHY & LENNON, LLC  
17 Attorneys for Plaintiff  
18 DEVIN JOHN LENNON

18 MAHONEY & KEANE, LLP  
19 Attorneys for Defendants  
19 GARTH S. WOLFSON

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21 (212) 805-0300

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1 (In open court)

2 THE COURT: We are here on the defendant Diamant's  
3 Company's motion to vacate the attachment as to Diamant.

4 I have recently issued memoranda decisions on the  
5 issue of whether registering with the Department of State, the  
6 New York Department of State, defeats the maritime attachment  
7 because the defendant would then be found within the state, and  
8 I have joined the district judges who have considered the  
9 issue. I believe that every district Judge in this district  
10 who has considered the issue has ruled that the defendant is  
11 found in this district if it is registered with the New York  
12 Department of State. The only contrary decision is Magistrate  
13 Judge Gorenstein's decision in Erne Shipping, which the parties

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14 discuss in their papers; but for the reasoning set forth in the  
15 numerous cases holding that a defendant is found within the  
16 district if it is registered with the New York Department of  
17 State in these prior decisions, I rule the same way.

18 So, I doubt that I would reverse myself in the context  
19 of this case. So I put that out there. And then it seems to  
20 me the issues that I would consider are what happens with  
21 respect to Diamant as the alleged alterego of ICI, given that  
22 ICI has registered. So, I guess I'll hear from Mr. Wolfson  
23 first since it's your motion.

24 MR. WOLFSON: Thank you, your Honor. Good morning.

25 THE COURT: Good morning.

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1 MR. WOLFSON: Simply put, there is really no possible  
2 outcome in this case that could result in the sustaining of the  
3 attachment. If we are not the alterego, then there is no  
4 claim. The claim is an alterego claim. If we are an alterego,  
5 then the Second Circuit has ruled quite clearly that for  
6 jurisdictional purposes -- and I think the inquiry as to  
7 whether defendant is found in the district is a jurisdictional  
8 inquiry -- then if the contracting party is found in the  
9 district, then the alterego must be found in the district as  
10 well.

11 There are several cases from the Second Circuit  
12 squarely on point with this. There have been one or two  
13 district court judges faced with this decision and they have  
14 also found that if you have an alterego claim and the  
15 contracting party is found in the district, then the alterego  
16 should be deemed found in the district as well, and there's no  
17 possible way the attachment can be sustained.

18 I think what's clear is you can't pick and choose.  
19 You can't say I'm an alterego for jurisdictional purposes but  
20 not for purposes on the merits. There have been a lot of  
21 charges back and forth about either party wanting its cake and  
22 eating it too and either party being selective.

23 I really don't think that is the case as far as  
24 Diamant is concerned. We are not trying to say we are an  
25 alterego for some purposes and not for others. We're saying

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1 take your pick. We'll have it either way. We can assume  
2 plaintiffs argument arguendo and the attachment must be vacated  
3 or we can assume it fails.

4 THE COURT: You are not conceding that you are an  
5 alterego, but if you are, then you are present.

6 MR. WOLFSON: Absolutely, your Honor.

7 THE COURT: And if you are not an alterego, then the  
8 plaintiff's theory fails because the plaintiff's theory is that  
9 you are an alterego.

10 MR. WOLFSON: Yes, your Honor.

11 THE COURT: OK. I understand your position.

12 MR. WOLFSON: I would say that the plaintiff is being  
13 selective. I mean, I do think this is a case where it's not  
14 just moral equivalency of the situation. There is a  
15 difference. The plaintiff is saying, well, let's not consider  
16 them the alterego for jurisdictional purposes, but let's  
17 consider them an alterego for determination on the merits.  
18 That's precisely what the Second Circuit has repeatedly ruled

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19 can't be done. There's really no good reason presented as to  
 20 why that same rule of law should not apply in the context of  
 21 Rule B.

22 THE COURT: Thank you.

23 MR. LENNON: Good morning, your Honor.

24 THE COURT: Good morning, Mr. Lennon.

25 MR. LENNON: Kevin Lennon for the plaintiff Sinope.

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1 In the first instance, I do recognize, your Honor, you have  
 2 recently issued a couple of decisions on the registration  
 3 issue. I think one was a Transfield case. While we take issue  
 4 with that, we acknowledge your prior rulings, and that's  
 5 obviously how you would find for ICI. Although in our papers  
 6 we do raise the point that even really akin to the alterego  
 7 theory itself, there's no valid reason we see why Sinope should  
 8 be prevented from challenging that registration.

9 We point out in our papers that ICI registered itself  
 10 in 2005. There is no arguments here. There's no evidence on  
 11 behalf of ICI. There's no appearance by ICI. They've declared  
 12 bankruptcy in the Greek courts, and there's absolutely no  
 13 evidence in any of the cases where ICI or --

14 THE COURT: In other words, you're asking the Court to  
 15 void the registration?

16 MR. LENNON: Exactly, your Honor.

17 THE COURT: Is there a procedure for that under state  
 18 law, and wouldn't ICI have the right to be heard, I would  
 19 think.

20 MR. LENNON: I would agree, your Honor. Under the  
 21 business corporation law, the sections we cite in our brief,  
 22 the Attorney General is specifically invested with the power to  
 23 challenge a registration, but also there's a further statute  
 24 which provides for any formed corporation to raise any claim,  
 25 any special proceeding or any action against any company doing

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1 business in the state or registered to do business. That's all  
 2 arguably ICI has done. In 2005 they registered to do business,  
 3 but our position would be they never actually did business.  
 4 They never intended to do business. All they did was file the  
 5 registration in a defensive effort to thwart any Rule B  
 6 attachments. So we think we are vested with that right. We  
 7 think your Honor could certainly make that finding; he has  
 8 discretionary power to do that.

9 THE COURT: Has any district judge done that in the  
 10 context of a maritime attachment?

11 MR. LENNON: Not to my knowledge, your Honor. I don't  
 12 believe the point has been raised in any prior briefings that  
 13 deal with the registration issue. I point out and I believe in  
 14 the cases presented to your Honor, it was actual the defendant  
 15 saying I have registered here to do business; therefore, my  
 16 registration should be sufficient to defeat the Rule B. Here,  
 17 clearly, Diamant as the alleged alterego is trying to piggyback  
 18 on to the ICI registration. So, as we say in our papers, the  
 19 registration of ICI is of central import to the finding on this  
 20 application. Diamant had not registered to do business when we  
 21 filed this attachment and your Honor granted the ex-parte  
 22 order. So, that's part one.

23 Secondarily, kind of related to that, Diamant is

24 obviously challenging that it's the alterego of ICI, and the  
 25 evidence presented, such as it is, your Honor, with respect to  
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1 the ICI registration, which we actually pointed out in our  
 2 initial papers, they lack any standing unless they're going to  
 3 say: We are the alterego, we can raise these arguments on  
 4 behalf of ICI. ICI has counsel in other cases. They've chosen  
 5 not to make an appearance here, so we'd ask the Court disregard  
 6 any arguments or evidence offered on behalf of ICI for its  
 7 benefit.  
 8 Thirdly, the cases cited by Sinope with regard to the  
 9 jurisdictional issue are litigated entirely in context outside  
 10 of Rule B. In every one of those cases, your Honor, as we set  
 11 forth in our papers, the finding of alterego was made by the  
 12 Court. So, they said you are the alterego, therefore we are  
 13 going to sustain jurisdiction.  
 14 Here, we have the polar opposite. We have, I'll  
 15 assume arguendo I am the alterego; therefore, vacate the Rule  
 16 B, but let me litigate the alterego. So, it's inconsistent  
 17 with the prior cases finding for the plaintiff's benefit. Yes,  
 18 we will find you to be the alterego, therefore, you're subject  
 19 to the Court's jurisdiction because the primary defendant is  
 20 subject to Court's personal jurisdiction. That is supportive  
 21 of the alterego theory itself.  
 22 Here again, it's the polar opposite, your Honor. We  
 23 have something that's entirely anathema to the reason for why  
 24 this action was filed and alterego theory liability exists in  
 25 the first place.

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1 Lastly, and perhaps really most importantly, your  
 2 Honor, the second prong of the being found test is that you're  
 3 subject to being able to be served with process. Here, Diamant  
 4 entirely glosses over that. What they want to have is the  
 5 Court find, well, ICI is registered, they can be served with  
 6 process, we are the alterego; therefore, if you serve process  
 7 on the designated agent, that would be process on us.  
 8 As pointed out in a companion action that's being  
 9 litigated before Judge Holwell, he reserved decision on DMI  
 10 being vacated from the case. Part of that was based on the  
 11 fact that the plaintiff in that case showed we tried to make  
 12 service on the designated agent. There's an affidavit  
 13 submitted of Jerome Willis in that companion case, it's exhibit  
 14 6 to our opposition memorandum of law, saying he went to serve  
 15 an alterego at the designated agent, CT Corporation Systems,  
 16 and said we can't serve process on them. They had no  
 17 registration for that particular defendant. So it's, again,  
 18 just glossing over that fact. That's a key component of the  
 19 Second Circuit's finding in the Seawind Compania case that you  
 20 not only have to be present for the jurisdictional purpose, you  
 21 also have to be amenable to service of process. Here there is  
 22 just no finding and there is no evidence that had Sinope  
 23 chosen, let's say for sake of argument, to leave Industrial  
 24 Carriers out of this case, out of the pleading, and simply  
 25 named Diamant among the alteregos, they would have any ability  
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to serve process within the district. That's a necessary finding to vacate the Rule B attachment.

THE COURT: All right. Thank you.

MR. LENNON: Thank you, your Honor.

MR. WOLFSON: Your Honor, just briefly as to the first point, it does seem we are just re-arguing Erne at this point. There was a decision by Judge Stein which was attached. It's the last order, Exhibit D to my declaration, discussing in particular ICI's alleged shortfalls in its registration. Judge Stein addressed that quite thoroughly in rejecting the argument of the plaintiff that that should somehow operate to render them found in the district or not found in the district, I should say, your Honor. Rather than belabor that, I would just refer to your Honor to that.

Also, it's my understanding that those alleged shortfalls have been remedied. So I really just don't think it has any bearing whatsoever on whether they're found in the district.

The question is whether they're amenable to suit registering with the DOS regardless of any shortfall in their biannual registration. They are amenable to suit here. They are amenable to the personal jurisdiction of the court here.

As far as service, there is no obligation --

THE COURT: How do you respond to the argument that this Court has the ability basically to void the registration

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finding that it's a sham registration?

MR. WOLFSON: I don't think, first of all, there has been a showing that it's been a sham registration at all. There are many corporations that if this is true do fall behind in their biannual registration. It doesn't mean they're a sham. The fact that it's a sham is really irrelevant to the inquire about whether they're found here for an ability to suit. They can be sued here. They've waived personal jurisdiction objections by filing with DOS. They've rendered themselves amenable to service within the district by filing with DOS.

I think it was probably best put by Judge Lynch -- I forget which decision it was. I can give your Honor the transcript if you'd like. The argument was, Judge, this is arbitrary. They can register to do business with DOS, and now they're found here, and it renders the whole process sort of arbitrary as to when you can get an attachment and when you can't. It has nothing to do with need.

Judge Lynch responded, yeah, it's arbitrary how you can get a Rule B attachment. Why shouldn't it be just as arbitrary how you get out of it? This is the standard that's put in place both by the language of the statute as re-affirmed by the Second Circuit on multiple occasions. This is the standard. You can't be found here. By registering with DOS, you are found here. Whether that was done to avoid Rule B

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attachment, whether that was done on a whim, for whatever reason it may be, you're found here.

THE COURT: OK. The second point is even assuming Diamant is the alterego of ICI, it can't be served through the

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5 Secretary of State. The Secretary of State won't forward the  
6 papers to Diamant because Diamant is itself actually not  
7 registered.

8 MR. WOLFSON: Yes, your Honor. Frankly, I think  
9 that's nonsense, your Honor. I think that the statute, the BCL  
10 is perfectly clear that by making service on the Department of  
11 State, that shall be deemed good and sufficient service period,  
12 whether or not your registration was ever was forwarded on to  
13 Diamant or not, the service is still good. So that's a  
14 complete red herring.

15 THE COURT: I guess the service is good on ICI. If  
16 it's good on ICI, then therefore it is good on Diamant?

17 MR. WOLFSON: That's what I was getting to, your  
18 Honor. We seem to be missing the point. The point is not  
19 whether Diamant could be served in the district. The point is  
20 whether ICI can be served in the district because the  
21 determination is whether ICI is found here. To be found here  
22 requires personal jurisdiction. We've done that by virtue of  
23 the waiver. And it requires being able to be served.

24 So, we keep missing the point and putting it back on  
25 to Diamant and we're straying from the actual inquiry. It's

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1 becoming a little fallacious because you're missing the point.  
2 The point is -- not your Honor, but the plaintiff is missing  
3 the point. The point is whether ICI is found here. These are  
4 the two criteria to being found here. If ICI is found here,  
5 then Diamant is found here. That's what the Second Circuit has  
6 held. So to inquire as to whether Diamant could be served here  
7 is really completely beside the point. It's an irrelevant  
8 distinction. That's why the plaintiff is focusing on this  
9 because we have a relatively simple matter of law which really  
10 should be determinative in this case, your Honor. It's not,  
11 you know, a question of us picking and choosing. It's a  
12 question of the plaintiff picking and choosing. There is just  
13 simply no way your Honor could rule today that we're not an  
14 alterego and we're found here, and then whatever the outcome  
15 is, the attachment will ultimately have to be vacated. We're  
16 either not an alterego or we are. In either case, the  
17 attachment needs to be vacated.

18 THE COURT: All right. Let's take a short break.

19 MR. LENNON: Your Honor, could I be heard just for one  
20 second?

21 THE COURT: Go ahead.

22 MR. LENNON: On the issue of Judge Stein's decision, I  
23 respectfully point out what was litigated there and was raised  
24 in our papers briefly is these technical defects: Failure to  
25 set forth biannual statement, to pay taxes, to pay your

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1 registered agents so that they actually carry out the duties.  
2 What we're saying in our papers is, we should actually have the  
3 opportunity to strike out the registration as a sham. That's  
4 never been brought before any of the district judges that have  
5 made any decisions on this issue.

6 So, Judge Stein's decision, I don't believe that  
7 argument was presented to him, and I don't think he ruled on  
8 it. So I think that's completely beside the point.

9 Diamant is saying we waive any objections to personal



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10 jurisdiction. Any defendant could do that and defeat a Rule B.  
 11 The point is whether or not the registration is effective and  
 12 they can benefit from that registration.

13 Lastly, your Honor, just in keeping with really the  
 14 theme of our papers, Diamant wants to say, you know, you have  
 15 to find one way or the other. This isn't fair. If we're an  
 16 alterego, we can't be held liable, but if we can bootstrap, but  
 17 if we're not, we can't be held liable. What we're saying is  
 18 consistent entirely with the alterego theory itself, your  
 19 Honor, where you pierce a corporate veil, which is not done  
 20 lightly, in order to achieve justice and prevent an inequitable  
 21 situation where a party is detrimentally affected by relying on  
 22 the corporate form.

23 That's exactly what we're trying to do here, your  
 24 Honor. Your own decision we which cite in our papers, the  
 25 Rubler DDS v. Unum Provident Corporation, 2007 U.S. District  
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1 Lexus 7791, your Honor states quite clearly: A party should  
 2 not be able to benefit from disregard of its corporate form.  
 3 Here, contrary to that, Diamant says, we're going to assume  
 4 arguendo, disregard our corporate form, we are the alterego,  
 5 vacate the Rule B attachment. That would be benefiting them.  
 6 Again, we submit that's entirely contrary to the equitable  
 7 theory of alterego liability. Thank you, your Honor.

8 THE COURT: Thank you. I'm going to take a short  
 9 break, and I'll come back out and rule.

(Recess)

11 THE COURT: I'm going to grant the motion to vacate  
 12 the attachment for the following reasons: First, as I have  
 13 previously held in other cases, I concur with the reasoning in  
 14 the decisions of the district judges who have held that a  
 15 defendant is found within the district if it is registered with  
 16 the New York Department of State. There are numerous decisions  
 17 so holding, and I adopt the reasoning of those cases.

18 Therefore, ICI is found within the district because it  
 19 had registered. To the extent that there were some technical  
 20 issues, Judge Stein addressed those in his decision that the  
 21 parties referred to.

22 Here, Sinope makes a new argument with an interesting  
 23 twist. It argues, in essence, that it should have the ability  
 24 to seek to annul or revoke the registration. I took a quick  
 25 recess to try and look in the business corporation law to see

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1 what the procedures are, and as Sinope acknowledges in its  
 2 memorandum, I think in the first instance, it's up to the  
 3 Attorney General of the state to bring an action to annul or  
 4 revoke.

5 It may be that private entities such as the plaintiff  
 6 may have standing to do it themselves as well, but I reject the  
 7 argument here because it's not pled in the complaint. There  
 8 hasn't been any notice given to ICI that this is sought. I  
 9 don't know whether it can be done in the context of an  
 10 ancillary proceeding that sought a maritime attachment in this  
 11 court. I haven't had time to fully look at the business  
 12 corporation law, but it's not pled, and I don't know whether  
 13 this Court even has the authority to revoke a company's  
 14 registration under the New York Business Corporations Law. But

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 15 at a minimum, ICI would be entitled to notice thereof and an  
 16 opportunity to be heard. ICI is a party in this case, but that  
 17 claim has not been asserted in the complaint. So ultimately  
 18 the argument fails.

19 We then turn to the issue of Diamant's alleged status  
 20 as an alterego. I don't think Diamant is trying to have it  
 21 both ways. It correctly argues that if it is an alterego,  
 22 which is indeed the theory set forth in the complaint, then it  
 23 is also found in the district because ICI is found here; and if  
 24 Diamant is ICI's alter ego, then it is found here as well.  
 25 Therefore, the first prong of the two-part test for a Rule B

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 1 attachment is not met. If Diamant is not an alterego, then the  
 2 claim asserted in the complaint fails. That's the claim. It  
 3 fails. I agree that either Diamant is an alterego or it is  
 4 not. It can't be that it is for one aspect and it is not for  
 5 another aspect. I don't think we need a concession from  
 6 Diamant that it is an alterego and it's pleading in the  
 7 alternative. If it is an alterego, it is not present. If it  
 8 is not an alter ego, then the claim fails on the merits because  
 9 that is the theory of the complaint as to Diamant.

10 Now, Sinope makes the argument that there is no  
 11 ability to serve Diamant because the Secretary of State won't  
 12 forward the papers to Diamant. Even assuming that's true,  
 13 first of all, the first prong is still not met. The first  
 14 prong of the test still is not met, but I understood counsel  
 15 for Diamant to concede that service on the Secretary of State  
 16 would be proper service on Diamant if indeed Diamant is an  
 17 alterego. And I think that's correct.

18 For all these reasons, I agree that the attachment  
 19 should be vacated as to Diamant, and I will issue an order to  
 20 that effect.

21 Now, what do we do with the case? It seems to me the  
 22 case is brought solely for the provisional remedy of a maritime  
 23 attachment. I've now concluded that ICI is found within the  
 24 district. I've concluded that the claim as to Diamant fails.  
 25 I guess we have some other defendants. The case remains as to

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 1 them for now?

2 MR. LENNON: I would believe so, your Honor.

3 THE COURT: All right. And ICI has not appeared,  
 4 right, in the case?

5 MR. LENNON: No, they have not, your Honor.

6 THE COURT: OK. I'll issue an order dismissing as to  
 7 Diamant for the reasons stated on the record and vacating the  
 8 attachment. Anything else today?

9 MR. WOLFSON: No, your Honor.

10 MR. LENNON: No, your Honor.

11 THE COURT: Thank you very much.

12 (Adjourned)

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